No. 16461

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT,

v.

ARTHUR E. BAKER, DORIS M. BAKER, JOHN L. ROACH AND BETTIE JO ROACH, APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

REPLY BRIEF FOR THE UNITED STATES, APPELLANT

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I

The Court Erred in Refusing to Instruct the Jury that Comparable Sales Are the Best Evidence of Market Value

The condemnees seek to justify the court's refusal of the comparable sales instruction on the grounds that the Government's testimony regarding comparable sales was insufficient to support such an instruction, and would have been an unwarranted comment on the evidence by the court. Therefore, they contend, the court was merely exercising its discretion in refusing the in-

struction. This argument confuses principles of valuation with comment on the evidence.

The charge we requested was a statement for the guidance of the jury that sales are the best evidence of value. *Carlstrom* v. *United States,* recently affirmed by this Court, No. 16,128, February 15, 1960, is an excellent illustration of the correct conduct of the trial. The court there instructed (pp. 2093-2096 of the record) that bona fide sales and leases of comparable properties, if such are found, made within a reasonable time before the date of valuation, are the best evidence of market value. Whether there are such comparable transactions is a question of fact for the jury.

Appellees argue at length (Br. 6-8) that the sales relied upon by the government experts were not comparable and were too remote for one reason or another. But, except for one sale, which he considered too remote in time (R. 49), the district judge admitted evidence of the sales. Whether they were comparable was for the jury. Appellees' argument thus, in fact, is a contention that the judge invaded the province of the jury, decided that the sales were not of comparable properties and therefore refused to give the requested charge. The appellees accuse the judge of contradictory actions. We do not believe this attack upon the district judge is warranted. The requested charge is a correct statement of law as to the weight to be given this *type* of evidence if the jury finds the necessary factual foundation, i.e., comparability (Opening Brief, pp. 14-17). In this regard it makes no difference in what form the evidence of sales comes in, i.e., whether as independent

evidence or as facts relied upon by the experts (cf. Br. 5). There is a vast difference between instructing the jury on the legal significance of a fact, if found, i.e., comparability, and commenting on the weight of the evidence relating to that fact. Appellees' argument falls when this distinction is recognized. Put otherwise, the instruction here requested related, not to the weight of the particular evidence, but to the weight of the general type of evidence under Fifth Amendment principles. The request thus was not, as appellees say (Br. 6), an attempted invocation of the court's discretion to comment on the evidence. Rather, it was an invocation of the court's right and duty to guide the jury as to the legal principles applicable to the facts. Once this distinction is recognized, we believe it is clear that appellees give no "justification for denial of comparable sales instructions" (Br. 5-8). We, of course, agree with appellees' "Proposition of Law No. 1" (Br. 12) (but not with their analysis of the decisions cited or of the record of the instant case thereunder). That is irrelevant, however, to the true issue of this case, which is whether the jury should be told the applicable principles of just compensation law. Under appellees' argument, any instruction giving the jury any indication of how to arrive at market value or what factors to consider would be excluded as comment on evidence relating to those factors. Clearly the jury is not to be left without such guidance.

That the requested instruction, if given, would have operated as a guide, and not as comment upon the weight of the evidence of comparability, is made per-

fectly clear when the remainder of the instructions are considered. The court instructed at length regarding the weight to be given the testimony of the experts: "It is your duty to determine whether such opinions are correct or erroneous" (R. 183). "You are the sole judges * * * of the weight that should be given to their testimony * * *" (R. 184). Then, correctly stating its position, the court said, "It is the province of the Court to declare to you the law applicable to any phase of the testimony, and it is your duty to apply that law to the testimony * * *" (R. 184). Having thus instructed the jury that they are the sole judges of the weight to be given the testimony, it would be an absurdity to presume, as do appellees, that an instruction that comparable sales are the best evidence would infringe upon that province. In the light of the overall charge, therefore, this instruction is unmistakably a correct statement of a principle of law intended to be applied by the jury to the facts as they found them, i.e., comparability, as a guide toward attainment of their ultimate goal, i.e., just compensation.

Appellees also say (Br. 10-12) that *United States* v. *Waterhouse,* 132 F.2d 699 (C.A. 9), is "practically 'on all fours' with the case at bar." The *Waterhouse* case is indeed a weak reed for any proposition since certiorari was granted but the case was affirmed byan equally divided court. *United States* v. *Waterhouse,* 321 U.S. 743. Passing that, the only similarity to this case of the *Waterhouse* case is that, like literally hundreds of other cases, value for subdivision purposes was

claimed.[1] There was no issue at all in that case as to instructions concerning comparable sales.

II

The Court Erred in Refusing to Instruct the Jury Not to Consider the Use Made of the Property by the Government After the Date of Taking

Appellees' first answer to our demonstration that this request was founded on correct law and was essential to prevent unjustified reliance merely upon the fact that the Government built the project to prove that private industry would do so, is the assertion that the *Waterhouse* case decided "THE IDENTICAL POINT" (Br. 17). No issue as to proof of a claimed higher use because the Government had used the condemned land for the purpose was involved in *Waterhouse*. If it stands for what appellees say it does, then, we submit, it is plainly erroneous. Nor do the instructions to exclude value to the Government cover this matter.

As in the first point, appellees confuse the issue in the application they seek to give the enhancement rule of *Miller, Cors* and similar cases (Br. 20-21). We agree that, since it was a preexisting project, demand created by Luke Air Force Base may be considered. But that

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[1] We believe the later cases make clear the error of the *Waterhouse* case in attempting to arrive at value of undeveloped land by multiplying or adding assumed value of lots after subdividing. *United States* v. *Certain Parcels of Land, Etc.*, 149 F. 2d 81 (C.A. 5, 1945); *United States* v. *3.544 Acres of Land, Etc.*, 147 F. 2d 596, 598 (C.A. 3, 1945); *United States* v. *Iriarte*, 166 F. 2d 800 (C.A. 1, 1948), cert. den. 335 U.S. 816.

circumstance may not, as appellees seek to do, be stretched to include compensation based upon a housing development which only the Government could construct. It must be remembered that the burden was on appellees to prove that there was sufficient probability of private industry constructing a housing project to fill the needs of Luke Air Force Base, not on the Government to prove the negative as appellees seemingly assume (Br. 17). Appellees seem to be saying that the burden is on the United States to prove that all enhancement because of housing potentiality could only result solely and exclusively from government military financing. The fact is that the present record shows precisely that and, while we only challenge the lack of instruction on this appeal, the valuations based on housing potentiality were inadmissible. As we have pointed out in our opening brief (pp. 3-5, 19-20), it is the very absence of private financing which forces the United States to undertake Wherry and Capehart projects and the witnesses for both parties recognized this fact. Appellees' own witness, after expressing familiarity with Wherry and Capehart projects, testified (R. 128):

> Q. And do you have an opinion as to whether that type of project would be needed if it was first developed by the land owners?
>
> A. I do not think so. I think it is obvious the only reason any development would go in there was because it was needed, and if private capital has not done it, then these various methods have been provided by law to take care of housing.

Under any view, appellees' evidence fell far short of showing that, absent Wherry Act financing, a private housing project was reasonably foreseeable, as was its burden under the *Cors* case and other cases.

The use of the land taken was not in issue so far as severance damages were concerned. This is obvious since, as appellees plainly point out, both parties agreed the former owners could not crop dust on the remaining land adjacent to the government housing project (Br. 22). But the use of the land taken was in issue as it related to proof of demand for housing. For this purpose the use of the land was inadmissible.

The objection raised by appellees does not justify complete refusal to give the instruction. At the very most, and if it were necessary at all, an instruction might have been given limiting consideration of the Government's use of the land solely to the issue of severance damages. However, it is readily apparent that, since severance damages based on the Government's use of the land were not in issue, the limitation was not necessary. Accordingly, there is no justification for the court's refusal to instruct as requested.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment below must be reversed with directions for a new trial to ascertain just compensation according to correct legal principles.

Respectfully,

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